

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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CHARLES WAYNE DEVERNA, JR.,

Plaintiff,

v.

STATE OF NEVADA, *et. al.*,

Defendants.

Case No. 3:15-cv-00384-MMD-WGC

ORDER ACCEPTING AND ADOPTING  
REPORT AND RECOMMENDATION OF  
MAGISTRATE JUDGE  
WILLIAM G. COBB

**I. SUMMARY**

Before the Court is the Report and Recommendation (“R&R”) of United States Magistrate Judge William G. Cobb (ECF No. 32) relating to Defendant’s motion to dismiss or, alternatively, motion for summary judgment (“Motion”) (ECF Nos. 16, 24.) Plaintiff filed a response (ECF No. 28) and a cross-motion for summary judgment regarding the Eighth Amendment deliberate indifference claim (“Cross-Motion”) (ECF No. 29). Defendants filed a reply in support of their motion (ECF No. 30), as well as a response to Plaintiff’s cross-motion for summary judgment (ECF No. 30). Plaintiff filed an Objection to the R&R (ECF No. 34) and Defendants filed a response to Plaintiff’s Objection (ECF No. 35).

After careful review and for the reasons discussed below, the Court adopts the R&R in full.

**II. BACKGROUND**

Plaintiff, an inmate proceeding pro se, brought two claims pursuant to 42 U.S.C. § 1983 arising out of incidents that occurred while he was placed at Northern Nevada

1 Correctional Center (“NNCC”).<sup>1</sup> (ECF No. 36 at 1.) In the Amended Screening Order, the  
 2 Court permitted Plaintiff to proceed with two claims arising from the Nevada Department  
 3 of Corrections’ (“NDOC”) failure to provide corrective surgery for Plaintiff’s umbilical  
 4 hernia: (1) an Eighth Amendment deliberate indifference to serious medical needs claim;  
 5 and (2) an Americans with Disabilities Act/Rehabilitation Act (“ADA/RA”) claim. (ECF No.  
 6 5 at 1-8.) The relevant background, which the Court adopts, is set out in the R&R. (See  
 7 ECF No. 32 at 1-3.)

### 8 **III. LEGAL STANDARD**

9 This Court “may accept, reject, or modify, in whole or in part, the findings or  
 10 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Where a party  
 11 timely objects to the magistrate judge’s report and recommendation, then the court is  
 12 required to “make a de novo determination of those portions of the [report and  
 13 recommendation] to which objection is made.” *Id.* In light of Plaintiff’s objections, the  
 14 Court has engaged in a de novo review to determine whether to adopt Magistrate Judge  
 15 Cobb’s recommendations. Where a party fails to object, however, the court is not  
 16 required to conduct “any review at all . . . of any issue that is not the subject of an  
 17 objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Indeed, the Ninth Circuit has  
 18 recognized that a district court is not required to review a magistrate judge’s report and  
 19 recommendation where no objections have been filed. *See United States v. Reyna-*  
 20 *Tapia*, 328 F.3d 1114 (9th Cir. 2003) (disregarding the standard of review employed by  
 21 the district court when reviewing a report and recommendation to which no objections  
 22 were made); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003)  
 23 (reading the Ninth Circuit’s decision in *Reyna-Tapia* as adopting the view that district  
 24 courts are not required to review any issue that is not the subject of an objection). Thus,  
 25 if there is no objection to a magistrate judge’s recommendation, then the court may  
 26 accept the recommendation without review. *See, e.g., Johnstone*, 263 F. Supp. 2d at

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27 <sup>1</sup>Plaintiff is currently placed at Warm Springs Correctional Center (“WSCC”). (ECF  
 28 No. 32 at 14.)

1 1226 (accepting, without review, a magistrate judge's recommendation to which no  
2 objection was filed).

#### 3 **IV. DISCUSSION**

##### 4 **A. Deliberate Indifference Claim**

5 Plaintiff's Objection (ECF No. 34) is two pages in length and contains seven  
6 pages of exhibits. Plaintiff makes no new arguments but reiterates that a failure to  
7 receive corrective surgery for his hernia is exposing him to future harm because of the  
8 possibility that the hernia could become incarcerated or strangulated. (ECF No. 34 at 1.)

9 To satisfy a deliberate indifference claim, the plaintiff "must show that the course  
10 of treatment the doctors chose was medically unacceptable under the circumstances  
11 and that the defendants chose this course in conscious disregard of an excessive risk to  
12 the plaintiff's health." *Snow v. McDaniel*, 681 F.3d 978, 988 (9th Cir. 2012) (internal  
13 quotations omitted). Moreover, a delay in receiving medical treatment, as alleged by  
14 Plaintiff, is actionable only where the plaintiff demonstrates that the delay led to further  
15 injury. *McGuckin v. Smith*, 974 F.3d at 1050, 1060 (9th Cir. 1992). Yet, Plaintiff fails to  
16 demonstrate that his hernia has gotten any worse such that corrective surgery is  
17 required.

18 As the Magistrate Judge noted, Dr. Mar admits that Plaintiff's hernia qualifies as a  
19 sufficiently serious medical condition (see ECF Nos. 32 at 15 and 30 at 6) but the Ninth  
20 Circuit has held that "[a] difference of opinion between a physician and the prisoner — or  
21 between medical professionals — concerning what medical care is appropriate does not  
22 amount to deliberate indifference." *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir  
23 2016). The Court finds that the evidence presented in the record and as summarized in  
24 the R&R (see ECF No. 32 at 9-15) fails to demonstrate that corrective surgery was the  
25 only appropriate solution to treat Plaintiff's hernia during the relevant time period.

26 Plaintiff also states that during visits with Dr. Mar after his transfer from NNCC to  
27 WSCC, he informed Dr. Mar that the abdominal belt that the doctor had prescribed was  
28 causing Plaintiff pain. (ECF No. 34 at 2.) Yet, the exhibits that Plaintiff attaches to his

1 Objection do not indicate that he has filed any subsequent grievances regarding this  
2 claim and none of the grievances or medical kites in the record allege that Dr. Mar  
3 ignored Plaintiff's alleged complaint that the abdominal belt was causing him pain. (See  
4 *id.* at 6-9.) Therefore, the Court finds that Dr. Mar's recommendations that Plaintiff lose  
5 weight, use the abdominal belt to hold in the hernia, and physically reduce the hernia, do  
6 not demonstrate a lack of deliberate indifference to Plaintiff's serious medical needs.<sup>2</sup>

7 **B. ADA/RA Claim**

8 Plaintiff does not address the failure to exhaust administrative remedies with  
9 regards to his ADA/RA claim. Because Plaintiff does not contest the Magistrate Judge's  
10 reasoning or recommendation, the Court accepts and adopts the Magistrate Judge's  
11 recommendation to dismiss this claim without prejudice. See *Thomas*, 474 U.S. at 149.

12 Having reviewed the R&R, the briefs relating to Defendants' Motion, Plaintiff's  
13 Cross-Motion, and Plaintiff's Objection, the Court agrees with the Magistrate Judge's  
14 well-reasoned analysis and recommendations. The Court will therefore adopt the R&R.

15 **V. CONCLUSION**

16 It is therefore ordered, adjudged and decreed that the Report and  
17 Recommendation of Magistrate Judge William G. Cobb (ECF No. 32) is accepted and  
18 adopted in full.

19 It is ordered that Defendants' motion for summary judgment (ECF No. 16) is  
20 granted with respect to the Eighth Amendment deliberate indifference claim. Defendants'  
21 motion for summary judgment is also granted with respect to Plaintiff's ADA/RA claim,  
22 but dismissal of the ADA/RA claim is without prejudice based on Plaintiff's failure to  
23 exhaust his administrative remedies. Defendants' preemption motion to dismiss (ECF  
24 No. 16) is denied as moot.

25 It is further ordered that Plaintiff's cross-motion for summary judgment (ECF No.  
26 29) is denied.

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28 <sup>2</sup>Plaintiff also states that after the issuance of the R&R, he has been approved for surgery to repair his hernia. (ECF No. 34 at 2.)

1 The Clerk is directed to enter judgment in accordance with this Order and close  
2 this case.

3 DATED THIS 21<sup>th</sup> day of February 2017.

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6 MIRANDA M. DU  
7 UNITED STATES DISTRICT JUDGE  
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